

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DUANE LEE EDGECOMB and DEPARTMENT OF THE NAVY,  
PATUXENT RIVER NAVAL AIR STATION, Patuxent River, MD

*Docket No. 00-1848; Submitted on the Record;  
Issued August 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of "store clerk" fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office abused its discretion in denying waiver of an overpayment of compensation in the amount of \$3,723.57; and (2) whether the Office properly determined that repayment of the overpayment would occur by withholding \$150.00 every four weeks from appellant's continuing compensation benefits.

On April 18, 1989 appellant, then a 35-year-old aircraft mechanic, filed a claim alleging that on April 18, 1989 he sustained injury to both his upper and lower back when he stepped through a missing floor panel in an aircraft. The Office initially accepted his claim for cervical and right shoulder strains and later expanded it to include major depression. Appellant received compensation benefits for all appropriate periods claimed and was placed on the periodic rolls.

On a June 29, 1998 Form CA-1032 appellant reported that he had worked as a store clerk for the period November 7, 1997 to March 9, 1998 at the rate of \$6.25 an hour.<sup>1</sup>

By decision dated May 11, 1999, the Office determined that appellant's actual earnings in the position of "store clerk" fairly and reasonably represented appellant's wage-earning capacity. The Office then retroactively reduced appellant's compensation benefits accordingly.<sup>2</sup> By letter

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<sup>1</sup> Appellant had independently obtained a job as a store clerk at a local home supply store on November 7, 1997 and was working with his supervisor to create a schedule that accommodated his physical limitations and requirements. However, he was terminated from his position effective March 9, 1998 due to circumstances unrelated to his employment-related injuries.

<sup>2</sup> On May 11, 1999 the Office made a retroactive determination in accordance with the Office Procedure Manual Chapter 2.814(7)(e) [Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(7)(e)] that the position of "store clerk" fairly and reasonably represented his wage-earning capacity. The May 11, 1999 decision, however, did not state the effective date of this retroactive determination.

also dated May 11, 1999, the Office advised appellant that he had received an overpayment of compensation for the period December 6, 1998 to April 24, 1999 because he was paid for temporary total disability when he should have received compensation for loss of wage-earning capacity.

The Office, by its preliminary determination, dated May 25, 1999, found that an overpayment in the amount of \$3,723.57 had occurred because appellant had inadvertently been paid compensation for temporary total disability instead of partial disability for the period December 6, 1998 to April 24, 1999 and found that appellant was not at fault in the creation of this overpayment. The Office advised appellant that he could apply for waiver of recovery of the overpayment and provided him an overpayment recovery questionnaire that he was to complete and return within 30 days.

Appellant disagreed with those decisions and requested an oral hearing before an Office hearing representative regarding the loss of wage-earning capacity decision. He did not respond to the preliminary overpayment decision.<sup>3</sup>

A hearing was held on November 2, 1999 at which appellant testified. By decision dated January 27, 2000, the hearing representative reviewed the extensive record and affirmed the May 11, 1999 wage-earning capacity decision finding that the Office had properly applied Chapter 2.814(7)(e) of the Office's Procedure Manual regarding retroactive determinations of loss of wage-earning capacity.

Following appellant's hearing, no further evidence appears to have been submitted to the record.

By decision dated March 29, 2000, the Office issued its final decision on overpayment<sup>4</sup> noting that "[appellant] has failed to complete and return the OWCP-20 overpayment repayment questionnaire. Financial information would be required in order to assess [appellant's] monthly expenses and income to render a decision on whether or not to waive the overpayment. [Appellant] has not responded or requested a hearing on his overpayment." The Office held that debt collection procedures require that, if a claimant is being paid compensation on the periodic rolls and does not respond to the preliminary overpayment decision, a final decision should be issued without conducting a conference and the debt should be recovered from such benefits as quickly as possible.<sup>5</sup> The Office determined that, since appellant had not responded with supportive financial information, the overpayment would be collected by withholding \$150.00

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<sup>3</sup> However, on appeal appellant submitted a copy of a U.S. Postal Service certified mail return receipt signed by Manuel Rodriguez on the date of delivery, June 28, 1999. Accompanying this proof of delivery was a copy of the completed overpayment recovery questionnaire dated June 20, 1999 and copies of the supporting financial information requested by the Office. However, as this evidence was not in the case record at the time of the Office's most recent decision, it cannot now be considered by the Board on this appeal. See 5 U.S.C. § 501.2(c).

<sup>4</sup> Appellant has not appealed the issues of fact or amount of overpayment.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.0200(4)(b), September 1994.

every four weeks from his continuing compensation benefits beginning March 26, 2000 and continuing until the overpayment had been repaid.

The Board finds that the Office properly determined that appellant's actual earnings as a "store clerk" fairly and reasonably represented his wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>6</sup>

Pursuant to 5 U.S.C. § 8115(a), in determining compensation for partial disability, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his wage-earning capacity.<sup>7</sup> The Board has previously explained that, generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>8</sup> If the actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>9</sup> The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a makeshift position designed for appellant's particular needs.<sup>10</sup> Office procedures specifically direct a claims examiner to consider factors such as part-time, sporadic, seasonal or temporary work, which would render the position unsuitable for such a determination.<sup>11</sup>

In the present case, appellant had actual earnings as a store clerk (a "customer service associate") for the period November 7, 1997 to March 9, 1998 at the rate of \$6.25 an hour or \$250.00 per week for working a 40-hour week.<sup>12</sup> While the Federal Employees' Compensation Act contemplates that actual earnings will not be used to determine wage-earning capacity if they do not fairly and reasonably represent wage-earning capacity, in the present case appellant had actual earnings for a period of over four months and he did not submit any evidence to establish

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<sup>6</sup> See *Kathleen Weiseman*, 50 ECAB 416 (1999); *James B. Christenson*, 47 ECAB 775 (1996); see *Clarence D. Ross*, 42 ECAB 556 (1991).

<sup>7</sup> *Carlos Perez*, 50 ECAB 493 (1999); *Gregory A. Compton*, 45 ECAB 154 (1993).

<sup>8</sup> *Id.*

<sup>9</sup> See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>10</sup> See *William D. Emory*, 47 ECAB 365 (1996).

<sup>11</sup> *Id.*

<sup>12</sup> Appellant was terminated from his employment on March 9, 1998 for reasons unrelated to his employment injury.

that his earnings as a store clerk did not fairly and reasonably represent his wage-earning capacity. As appellant's position as store clerk was not makeshift,<sup>13</sup> part time, seasonal, sporadic or temporary<sup>14</sup> and as he worked at the position successfully for more than 60 days,<sup>15</sup> the Office properly determined his wage-earning capacity based upon his actual earnings rather than on a constructed position.

Thereafter the Office applied the formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>16</sup> which has been codified at 20 C.F.R. § 10.403. The Office first calculated appellant's wage-earning capacity in terms of percentage by dividing his earnings by the "current" pay rate.<sup>17</sup> Appellant's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes (defined at section 10.5(s) as the pay rate at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater) by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.<sup>18</sup> Compensation payable is then adjusted by the applicable cost-of-living adjustments. The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents his wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.<sup>19</sup>

Based upon the facts of this case the Board finds that appellant had worked in the position of customer associate (sales clerk) steadily for a period in excess of 60 days, the Office had made a determination that the employment position of sales clerk fairly and reasonably represented appellant's wage-earning capacity and appellant's work stoppage did not occur because of any change in his injury-related condition affecting his ability to work, but rather occurred because appellant was terminated from Lowe's for inappropriate behavior. Therefore, the Board finds that such a retroactive determination of loss of wage-earning capacity is appropriate under the facts of this case.

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<sup>13</sup> See *William D. Emory*, *supra* note 10; (grandfather's babysitting position was designed for his particular needs).

<sup>14</sup> See *Monique L. Love*, 48 ECAB 378 (1997) (appellant's position was "sheltered" designed only for her particular needs).

<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (November 2000); see *contra Beverly Dukes*, 46 ECAB 1014 (1995); *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1995) (both finding that appellant had not worked the "minimum" 60-day period).

<sup>16</sup> 5 ECAB 376 (1953).

<sup>17</sup> "The Office may use any convenient date for making the comparison as long as both rates are in effect on the date used for comparison." 20 C.F.R. § 10.403(d).

<sup>18</sup> 20 C.F.R. § 10.403(e).

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997); see also *Elbert Hicks*, 49 ECAB 283 (1998).

The Board also finds that, based on the evidence appearing in appellant's case record, the Office properly determined that waiver of the overpayment was not warranted.

Section 8129 of the Act<sup>20</sup> provides that recovery of an overpayment of compensation may not be made when "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter of the Act or would be against equity and good conscience."<sup>21</sup>

In the present case, the Office has determined that appellant was not at fault in the creation of the overpayment and thus fault is not at issue. The Office must, therefore, exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the Act" or the "against equity and good conscience" provisions of the Act<sup>22</sup> pursuant to the guidelines set forth in sections 10.434, 10.436 and 10.437 of the Office's regulations.<sup>23</sup>

As no financial information appeared in the case record at the time the Office made its determination, it could not determine whether recovery would be against equity and good conscience or whether it would defeat the purpose of the Act. The Office, making its decision on the existing case record, did not abuse its discretion.<sup>24</sup> In accordance with the Office's implementing regulations, 20 C.F.R. § 10.438(a) and (b), the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. Failure to submit the requested information within 30 days of the request shall result in a denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>25</sup>

The Board also finds that the Office properly determined that withholding \$150.00 every four weeks out of appellant's continuing compensation benefits was appropriate.

In the Office's implementing regulations at 20 C.F.R. § 10.441(a) it states that "[w]hen an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered.... If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any

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<sup>20</sup> 5 U.S.C. §§ 8101-8193.

<sup>21</sup> 5 U.S.C. § 8129.

<sup>22</sup> See *Jesse T. Adams*, 44 ECAB 256 (1992); *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>23</sup> 20 C.F.R. §§ 10.434, 10.436 and 10.437.

<sup>24</sup> See *William D. Emory*, 47 ECAB 365 (1996) (the Office properly denied waiver where appellant submitted no financial information to establish that recovery of the overpayment would defeat the purpose of the Act or that he relied on the payments or notice of payments by relinquishing a valuable right or changing his position for the worse).

<sup>25</sup> See also *Stanley K. Hendler*, 44 ECAB 698 (1993).

hardship.” When an individual fails to provide the requested financial information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.<sup>26</sup> Further, as the amount of adjustment of continuing compensation to recover an overpayment lies within the Office’s discretion the analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.<sup>27</sup>

However, as no financial information appeared in the case record at the time the Office made its determination of the amount of repayment out of appellant’s continuing compensation benefits, it could not assess or take in to account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual or any other relevant factors, so as to minimize any hardship. In an effort to promptly collect the overpayment, the Office, therefore, did not abuse its discretion by requiring repayment at the rate of \$150.00 every four weeks.<sup>28</sup>

Accordingly, the decisions of the Office of Workers’ Compensation Programs dated March 29 and January 27, 2000 and May 11, 1999 are hereby affirmed.<sup>29</sup>

Dated, Washington, DC  
August 14, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>26</sup> See *Frederick Arters*, 53 ECAB \_\_\_\_ (Docket No. 01-1237, issued February 27, 2002).

<sup>27</sup> See *Howard R. Nahikian*, 53 ECAB \_\_\_\_ (Docket No. 01-138, issued March 4, 2002).

<sup>28</sup> See, e.g., *Paul K. Raditch*, 43 ECAB 738 (1992) (the entire amount of the overpayment was immediately due and payable where appellant had not submitted sufficient financial information to permit the Office to establish a payment schedule).

<sup>29</sup> The Board cannot consider the evidence submitted after March 29, 2000. Appellant may resubmit such evidence with a request for waiver under 20 C.F.R. § 10.438(b).